

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPETITIVE PRODUCT PRICES
PARCEL SELECT CONTRACT 44

Docket No. MC2021-42

COMPETITIVE PRODUCT PRICES
PARCEL SELECT CONTRACT 44 (MC2021-42)
NEGOTIATED SERVICE AGREEMENT

Docket No. CP2021-43

MOTION BY STRATEGIC ORGANIZING CENTER REQUESTING ACCESS TO NON-PUBLIC MATERIALS UNDER PROTECTIVE CONDITIONS

(August 17, 2022)

The Strategic Organizing Center (SOC) respectfully submits this Motion pursuant to 39 C.F.R. § 3011.301 requesting access to the full, unredacted versions of the most commercially significant negotiated service agreement (NSA) currently in effect between the United States Postal Service (USPS or Postal Service) and Amazon.com, Inc. (Amazon), and the supporting Governor's Decision. Upon information and belief, this agreement is Parcel Select Contract 44 and accompanying Attachments, Exhibits, and Schedules, filed as Appendix B to the Postal Service's Request that the Postal Regulatory Service (PRC) add the contract to the Competitive Product List, Dockets CP2021-43 and MC2021-42 (Contract 44 or Contract).¹ SOC's Motion should be granted because the Postal Service has failed to carry its burden of showing the

¹ In substance, this Motion seeks access to the same materials requested in SOC's May 12, 2022 Motion seeking access to the non-public sections of Contract 200 filed in Docket No. CP2021-117 – that is the main, current Negotiated Service Agreement between USPS and Amazon. SOC's current information and belief is that Contract 44 contains the information which it sought in its May 12 Motion, and accordingly refiles within Dockets CP2021-43 and MC2021-42 as directed in Order 6189.

balance of interests favor withholding the information SOC seeks, and the Postal Service has waived any further right to object to release of the information because it has repeatedly/continuously sought to avoid the regulatory process that governs its conduct by spuriously claiming it has no power to release any non-public information at issue, in contravention of its contractual and regulatory obligations.

SOC seeks access to these document “for the purpose of aiding participation in a pending Commission proceeding (including compliance proceedings) or aiding the initiation of a proceeding before the Commission.”²

In particular, SOC seeks access to these documents for its counsel so that SOC may investigate and initiate a complaint before the Commission pursuant to 39 USC § 3662. The SOC anticipates the complaint will allege that in its performance of Contract 44, the Postal Service is giving undue preference to the counterparty to the contract in violation of 39 USC § 403(c), is causing delays to the delivery of equivalent service categories of “important letter mail” in violation of 39 USC § 101(e), and is undermining “effective and regular postal services to rural areas” in violation of 39 USC § 101(b).

SOC’s individual counsel are identified in Exhibit 1 to this motion and each has executed a copy of the Commission’s protective order conditions.³

1. Procedural History

On May 12, 2022, SOC filed a motion with the PRC requesting access to the unredacted versions of the NSA currently in effect between the Postal Service and Amazon, and of the supporting Governor’s Decision. The Motion stated that SOC has

² 39 C.F.R. § 3011.300(c).

³ SOC specifies that it did not provide notice of its Motion for Access prior to this filing to each person identified in the Postal Service’s application for nonpublic treatment pursuant to 39 C.F.R. § 3011.201(b)(2).

preliminary evidence suggesting that USPS is unduly preferencing Amazon in violation of 39 USC § 403(c), 39 USC § 101(e), and 39 USC § 101(b), and that SOC seeks the unredacted materials to further investigate the basis for these potential violations in contemplation of initiating a complaint before the Commission pursuant to 39 USC § 3662. SOC's Motion included its counsels' certification of their agreement to comply with the PRC's extensive protective conditions for granting access to non-public materials.

On May 18, 2022, the Postal Service filed a response in opposition to the Motion urging the Commission to deny the Motion with prejudice on the grounds that the procedures established by PRC Rules §§ 3011.300(c) and 3011.301(b)(2)(ii) should not be available to parties preparing to initiate a proceeding before the Commission given the availability of alternative means of information discovery, the prospect that disclosure of the information would damage USPS's business relationships, and that the information sought was not relevant to SOC's potential legal claims.⁴

On June 6, the Commission issued Order 6189, which denied SOC's Motion without prejudice and held proceedings in abeyance pending the parties' filing a joint statement after their counsel had met and conferred "in a good faith effort to narrow or resolve disputed issues and clarify the parties' positions on any issues they cannot resolve."⁵ In the Order the Commission expressly rejected the Postal Service's contentions that access to non-public materials in aid of initiating a proceeding before the Commission should never be granted because such materials should not be

⁴ Response of the United States Postal Service in Opposition to Motion for Access to Non-Public Materials, May 18, 2022, at 1, 4 (Postal Service Response).

⁵ Order at 12.

released solely to aid a potential proceeding before the PRC,⁶ or because there are other procedural mechanisms by which a party can obtain access to non-public information such as civil discovery.⁷ In doing so the PRC noted that the USPS's objections repeated the arguments it asserted in opposition to the promulgation of Rule 3011.301(b)(2)(ii) in 2018, which created a process for parties to receive access to non-public materials in aid of initiation of new proceedings, and further noted that it had expressly considered and rejected those arguments at the time the rules were issued.⁸ In the Order the PRC similarly rejected the Postal Service's objection, also raised and rejected at the time the rules were considered, that protective conditions to which persons who obtain non-public information are subject are inadequate to protect the interests at stake.⁹

The Commission also noted that SOC's Motion represented the first instance in which a party has sought to use the procedure established by §3011.301(b)(2)(ii), and concluded that "it is in the public interest to allow the public (here, SOC) meaningful opportunities under §§ 3011.300(c) and 3011.301(b)(2)(ii) to gain access to non-public information to aid initiation of a proceeding before the Commission . . . in furtherance of the Commission's overall goal of providing accountability, transparency, and oversight of the Postal Service."¹⁰

In denying the SOC's Motion without prejudice, the Commission further suggested the SOC had likely not requested the correct NSA; thus the first issue on

⁶ Order at 10.

⁷ *Id.* at 11.

⁸ *Id.* at 9-11.

⁹ *Id.* at 10-11.

¹⁰ *Id.* at 11.

which SOC and USPS were directed to confer was the identification of the applicable NSA between USPS and Amazon.

To that end, the Order directed the SOC and the Postal Service to meet and confer and to file a Joint Statement specifically addressing:

- a. Potential identification of the docket or contract number(s) applicable to NSAs between the Postal Service and Amazon;
- b. Potential provision of the unredacted text of the applicable contract(s) between the Postal Service and Amazon and the supporting Governor's Decision(s);
- c. Potential narrowing of the scope of non-public materials sought by SOC;
- d. Potential terms for a non-disclosure agreement governing SOC's counsel's use, care, and dissemination of any non-public information and materials; and
- e. Any other potential matter that would aid in an efficient resolution of the request for access to the non-public materials.¹¹

The Order denied the Motion without prejudice to SOC refiling a request for access to non-public materials at least 7 calendar days after filing of the Joint Statement.¹²

The Postal Service and SOC met on July 25, 2022 and July 27, 2022, but despite efforts by both parties, were unable to resolve or narrow the disputed issues.¹³

More specifically, the Postal Service stated in those conferences that the terms of any contract that might exist would "likely limit the ability of the Postal Service to

¹¹ *Id.* at 13.

¹² *Id.* at 12.

¹³ Joint Statement of the United States Postal Service and Strategic Organizing Center Pursuant to PRC Order 6189 at 2 (Aug. 5, 2022) (Joint Statement).

disclose both the identity of the other party thereto or any of the non-public terms thereof,” and that “beyond its potential inability to disclose the parties or non-public terms without risk of breaching such a hypothetical contract, it would be contrary to the Postal Service’s interests to agree voluntarily to do so.”¹⁴ Thus, the Postal Service took the position it was unwilling and purportedly unable to release any non-public information sought by SOC, including the identity or existence of the contract SOC seeks.¹⁵ The Postal Service further reiterated objections raised in its Response to SOC’s Original Motion and rejected by the PRC in the Order that public records requests or discovery are adequate to provide for disclosure of non-public information.¹⁶ The Postal Service similarly proposed several procedures to avoid established PRC procedures, including (a) that rather than SOC obtaining information to investigate a potential complaint, SOC could reveal detailed source information so that the USPS could conduct its own investigation;¹⁷ (b) that USPS could provide a statement containing a determination whether or not the contract SOC seeks contains information relevant to SOC’s inquiry, although it likely could not release such a statement without outside party consent;¹⁸ and (c) that rather than relying on SOC’s certification to adhere to the PRC’s full set of protective conditions governing disclosure of non-public information, which USPS believed “might not be sufficient to ensure non-disclosure,” it instead “sought to explore the possibility of entering into a separate non-

¹⁴ *Id.* at 2.

¹⁵ See Supplemental Submission Regarding Motion Requesting Access to Non-Public Materials Under Protective Conditions at 8-10 (Aug. 5, 2022) (SOC Supplemental Submission).

¹⁶ Postal Service Response at 1, 4; Order at 11; SOC Supplemental Submission at 6-7.

¹⁷ Joint Statement at 4.

¹⁸ *Id.*

disclosure agreement between the parties that would be enforceable in federal district court."¹⁹

On August 5, 2022, SOC filed the SOC Supplemental Submission seeking immediate release of the Contract on the grounds that USPS waived its right to object to release of the non-public information SOC seeks by claiming it is both unwilling and powerless to release any non-public information sought without Amazon's consent and instead advancing purported alternative ways to resolve SOC's inquiry, thereby attempting to circumvent the regulatory process established for the very purpose of ensuring for appropriate transparency, accountability, and public participation in the oversight of the Postal Service itself.

2. Argument

a. SOC should be granted access because the information is highly relevant to its inquiry and the balance of interests favors access.

SOC is in possession of preliminary but troubling evidence that suggests that USPS's Contract 44 is causing the Service to violate these legal obligations under 39 USC 403(c) not to, "in providing services ... make any undue or unreasonable discrimination among users of the mails, nor grant ... any undue or unreasonable preferences to any user [of the mails];" under 39 USC 101(e) to "give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail;" and under 39 USC 101(b) to "provide a maximum

¹⁹ *Id.* at 4-5.

degree of effective and regular postal services to rural areas, communities, and small towns.”

In an online survey of USPS employees that SOC conducted during the 2021-2022 holiday season, a substantial majority of respondents reported that they had been instructed by managers to prioritize Amazon packages over every other kind of mail.

According to SOC’s follow-up interviews with survey respondents, USPS management consistently pressures USPS employees to sort and deliver Amazon packages as fast as possible, but does not exert the same pressure regarding other types of mail. And as a predictable result, respondents reported that when, as often happened, it was necessary to choose whether to process and deliver Amazon packages or other mail, they would prioritize Amazon’s.

In addition, respondents also reported that USPS does not seek recourse for physical damage caused by Amazon deliveries to USPS facilities, and that Amazon may cancel its use of a particular post offices without giving meaningful notice.

This evidence indicates that USPS’s negotiated service agreement with Amazon likely includes terms that violate or have the effect of causing the Postal Service to violate its core legal obligations not to discriminate between users, to prioritize letter mail, and to the extent that the agreement has these impacts primarily in low-population-density areas, to provide effective services to rural communities.

SOC therefore requires access to the unredacted text of Contract 44 and the supporting Governor’s Decision to assess whether there are valid grounds for a complaint to the PRC regarding the Contract. Specifically, it requires access to the materials in order to determine:

- The precise service classes within which Amazon mail is to be delivered under the Contract because this information would clarify whether the conduct reported by our respondents is caused by undue preferencing of Amazon within service classes or by Amazon's use of particular service classes.
- Whether the contract includes terms on its face or as applied that could induce USPS management to unduly preference Amazon against other users within these classes such as terms that commit USPS to faster delivery standards than those for the applicable service class as a whole, or that provide inducements or penalties that incentivize USPS to deliver Amazon mail faster than other mail within the same class.
- The particular locations where Amazon mail is to be delivered under Contract 44, and the terms applicable to those locations, in order to understand whether the Contract causes USPS to compromise services to rural communities.
- Whether the contract contains any other terms that on their face, or as applied, unduly preference Amazon by incentivizing or causing USPS not to enforce Amazon's obligations under the contract, for instance, regarding damage to USPS property or providing notice before terminating its use of particular post offices.

SOC anticipates initiating a complaint proceeding before the PRC within 60 days of receiving access to the materials.

In determining whether to grant access to non-public materials, the Commission "balance[s] the interests of the parties consistent with the analysis undertaken by a

Federal court when applying the protective conditions appearing in Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3011.301(e).²⁰ Rule 26(c) provides that

A court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, [upon a motion from] [a] party or any person from whom discovery is sought...[coupled with] a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.²¹

In Order 6189 the Commission stated that the “party opposing access to non-public information, analogous to requesting a protective order under Fed. R. Civ. P. 26(c), ‘bears the burden of making the showing of good cause contemplated by the rule and therefore must make a specific demonstration of facts in support of the request[.]’”²² Based on federal court interpretations of Rule 26 (c) the Commission identified five specific factors to be considered in deciding whether the party opposing access had met this burden, that is:

1. the requester’s need for the information from this particular source;
2. the information’s relevance to the litigation at hand;
3. whether the party benefiting from a protective order is a public entity or official;
4. whether the information relates to issues important to the public; and
5. the harm which disclosure would cause to the party seeking to protect the information.²³

²⁰ The Rule is authorized by 39 U.S.C. § 504(g)(3)(B).

²¹ Fed. R. Civ. P. 26(c)(1).

²² Order at 7 (quoting *Smith v. Yeager*, 322 F.R.D. 96, 99 (D.D.C. 2017)).

²³ Id. citing *Burka v. U.S. Dep’t of Health & Human Servs.*, 87 F.3d 508, 517 (D.C. Cir. 1996), *Castellani v. Atl. City*, 102 F. Supp. 3d 657, 666 (D.N.J. 2015).

Based on consideration of these factors, the Postal Service cannot meet this burden because these factors weigh in favor of granting SOC access to the non-public materials, and the only arguments offered by USPS in this respect have been repeatedly considered and rejected by PRC.

All factors in the analysis weigh in favor of granting SOC access to the information it seeks. Regarding the first and second factors, the Contract is of clear and unique relevance to the complaint SOC is considering submitting to the Commission. The reports SOC has received of undue discrimination in favor of Amazon suggest that the Postal Service takes action to ensure timely processing and delivery of Amazon packages without taking such action with respect to any other category of mail. SOC does not, however, have reliable information as to the prevalence of these practices, what policies or practices might be incentivizing or causing them, or what powers the Postal Service has under the Contract or otherwise to correct them. The unredacted portions of the Contract signal the existence of redacted portions that go directly to these issues, for instance, “Service Endeavors, Performance Measurement and [redacted].”²⁴ Furthermore, the Postal Service indicated during the meet and confer process that the key provisions of the Contract are the product of negotiations between the parties rather than any publicly available or disclosable template.²⁵ In short, SOC has a pressing need for full contents of the Contract and these contents are of vital relevance to the litigation at hand.

Factor three, “whether the party benefiting from a protective order is a public entity,” also weighs in favor of disclosure. The Postal Service is one of the first and

²⁴ Contract, Section I.K at pp 12-16.

²⁵ Joint Statement at 3.

most important national public institutions in the United States, and its operations have a direct impact on almost all American households.²⁶ Congress requires that USPS “shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people.”²⁷ To the extent that the Commission finds the status of Amazon (which to SOC’s knowledge has not yet intervened in these proceedings) as a private corporation as relevant to this factor, SOC urges the Commission to consider that in terms of economic power, operational reach, and impact on American consumers, the company’s functioning is of vast importance to the general public.

Similarly, factor four, “whether the information relates to issues important to the public,” weighs strongly in favor of disclosure. SOC is a not-for-profit, democratic union federation whose affiliated unions represent more than four-million working people. Members of our affiliates are also users of the Postal Service who have a vital interest in the fairness, legality, and efficiency of its operations. SOC has an extensive record of advocacy on behalf of American workers and consumers and to this end publishes research-based policy reports and files complaints in the public interest with relevant government agencies. In order to effectively conduct these advocacy activities, SOC requires accurate information from reliable sources. Examples of SOC research and advocacy reports can be found [here](#).

²⁶ *E.g.*, THE UNITED STATES POSTAL SERVICE: AN AMERICAN HISTORY, at 1 (“the Postal Service is a vital element of our economy and communications infrastructure ... serv[ing] our country for more than 240 years...); *id.* at 4 (relating that the Second Continental Congress established a committee to consider the creation of a national postal service in 1775), <https://about.usps.com/publications/pub100.pdf>.

²⁷ 39 USC 101(a).

In addition, the business relationship between USPS and Amazon is of crucial interest to the public. Amazon is likely USPS's biggest single customer and source of revenue.²⁸ If the reports SOC has received are representative, the prioritizing of Amazon packages may result in the delay of other vital deliveries, such as prescription drugs and social security checks. Preferential treatment for Amazon also disadvantages Amazon's competitors, including the hundreds of thousands of small businesses that rely on USPS to deliver to their customers, and further entrenches Amazon's already overwhelming dominance over e-commerce.²⁹

Moreover, as the Commission notes, SOC's request for access to the contract between USPS and Amazon is the first instance in which a party has sought to use the right to access non-public materials in aid of initiation of a proceeding before the Commission that the PRC established via Rule § 3011.300 (c) in 2018.³⁰ In its Response in Opposition to SOC's May 12, 2022 Motion, the Postal Service urged the Commission to deny the Motion with prejudice on the ground that access to nonpublic materials in aid of initiation of a proceeding should *never* be granted, effectively asking for the PRC to nullify its own rule.³¹ By taking this position the Postal Service has made SOC's request a test case for Rule § 3011.300 (c). The public has a compelling interest, therefore, in whether the Commission will follow through on its 2018 determination that establishing this mechanism for access to non-public materials

²⁸ See, e.g., <https://www.businessinsider.com/amazon-brings-in-nearly-4-billion-annual-revenue-usps-report-2020-9?r=US&IR=T#:~:text=Newly%20released%20documents%20obtained%20by%20American%20Oversight%20show,roughly%2030%25%20of%20the%20technology%20company%27s%20total%20volume.>

²⁹ In 2021 Amazon had a 41% share of the e-commerce market, six times more than its nearest competitor, Walmart. <https://www.insiderintelligence.com/content/amazon-clobbers-competition-us-retail-ecommerce-sales-2021?ecid=NL1014>.

³⁰ Order at 11.

³¹ Postal Service Response at 3-4.

advances “the Commission’s overall goal of providing accountability, transparency, and oversight of the Postal Service.”³²

Finally, the Commission states that it considers “the harm which disclosure would cause to the party seeking to protect the information.” This factor too weighs in favor of granting SOC access.

First, and foremost, SOC is not requesting *disclosure* of the materials, only access, subject to the strict protective conditions set by the Commission, in order to review the materials in preparation of a potential complaint. SOC is not seeking to – and under the terms of its certifications to the Commission does not have the right to – disclose or disseminate the materials. USPS has no evidence or reasons to suppose that SOC counsel will not strictly adhere to their certification to abide by these conditions, particularly given their ethical obligations as attorneys. Granting access therefore creates no potential harm to the Postal Service’s business interests, unless the Postal Service is advancing the unlikely claim that providing SOC with the information it needs to potentially file a credible complaint before the Commission is itself a cognizable form of “harm” which, again, would be directly contrary to the regulatory avenue for public oversight the PRC’s rules provide.

Second, the Commission should treat with skepticism the Postal Service’s claim that granting access to the materials would jeopardize its ability to do business with private companies because they would fear disclosure of business confidential information, for the simple reason that these companies are surely on aware that their dealings with USPS may be subject to disclosure. As discussed above, the

³² Order at 11.

Confidentiality Clause of Contract 44 states that “applicable law” may require USPS to disclose information regarding the Contract. The only obstacle the clause places in the way of this possibility is its provision that the Postal Service will not disclose information unless it either consults with the counterparty or is to compelled to disclose by law.³³ Thus Amazon, and USPS’s many other private business partners are already on notice regarding the possibility of information disclosure (in this case, we reiterate, simply access), and by entering into agreements with the Postal Service, they have accepted this risk.

b. SOC should be granted access to the information because USPS has waived its right to object.

SOC should be granted full access to the Contract without further delay because USPS has waived its right to object to the release of the non-public information SOC seeks. USPS has done so by taking the position in the parties’ conference to meet and confer that it is unwilling as well as powerless to agree to release any non-public information because it must first obtain Amazon’s consent to any such release. In contending it is powerless to release information without Amazon’s consent – and in asserting several purported alternative ways of responding to SOC’s inquiry and objectives – USPS is attempting a blatant end-run around the very system established for public participation in oversight of USPS itself. That system, through rules promulgated by the PRC, properly balances USPS’s business interests against the public’s interest in accountability and transparency. Accordingly, the Postal Service’s refusal to recognize or participate in the process established under the rules constitute

³³ Opposition at 3.

grounds for immediately granting SOC's Motion and granting SOC access to the full unredacted version of the Contract, along with the supporting Governor's Decision, between USPS and Amazon.

The first reason USPS has waived its right to object to the release of the non-public information is that it has persistently sought to avoid the regulatory process established by the PRC and thereby has effectively refused to agree to negotiate any release of information. In conferring with SOC, USPS stated it would not release any information from any NSA voluntarily, including the identity of any NSA between USPS and Amazon, based on the same arguments considered and rejected in the PRC's Order. Instead, the Postal Service suggested several alternative procedures that amount to a further rejection and attempted end-run around the process established by the PRC – as reiterated in the Order – for the public to obtain protected access to non-public information to enable the public to participate meaningfully in the PRC's procedures and provide public accountability and oversight regarding matters of important public interest.

At the outset, USPS reiterated that it should not need to release information to SOC because SOC could use FOIA or civil discovery to obtain non-public portions of the contract. The PRC considered and rejected this objection in the Order, Order at 11, yet USPS persists in raising this as a reason it will not provide information in response to SOC's Motion.

USPS also stated SOC should have disclosed further, detailed information about its current sources for the purpose of allowing USPS to conduct its own investigation into possible preferencing of Amazon, which would negate the need for SOC to further

investigate or file a complaint. USPS thus proposes substituting its own investigation and judgment for the public inquiry specifically authorized under PRC Rule § 3011.300 (c).

Similarly, USPS proposed providing, in lieu of a contract or portions thereof, a statement that would consist of the USPS's own determination whether or not the contract at issue contains any information responsive to SOC's interest in the contract. Again, USPS is seeking to substitute its own review and conclusions for the transparency and public scrutiny provided for under Rule § 3011.300 (c).

Finally, in considering possible terms of an agreement to protect non-public information, USPS also rejected the certifications SOC's counsel made in the Motion under Rule § 3011.301 (b)(5) and (6) agreeing to comply with the extensive protective conditions required by the Commission including that they will use the materials only for the purpose authorized by the Commission, that they will protect all materials from dissemination or disclosure to unauthorized persons, and that they will execute and file Certifications of Compliance with Protective Conditions and Termination of Access upon termination of their access to the materials. Rather, USPS stated these protections are inadequate and would seek to execute a separate order, enforceable in a federal district court, to protect any non-public information SOC obtains. This is yet another way in which USPS – while suggesting SOC will not respect PRC's authority or its rules – is itself attempting to disregard the PRC's established process for public accountability and divert this matter into an entirely separate process of its own making.

In summary, the USPS proposes circumventing the regulatory process established for public participation and obtaining non-public information by a) refusing to provide any information including assisting in identifying or confirming the correct contract; b) maintaining that SOC should use civil discovery or public records laws rather than the PRC process; c) asserting SOC should reveal detailed information about its current sources to enable the USPS to substitute its own investigation of SOC's potential allegations for SOC's inquiry; d) proposing that USPS make its own substantive determination whether any contract terms bear on potential preferencing of Amazon and issue a statement reflecting that determination to SOC in lieu of providing any non-public information to SOC as, once again, the regulatory process provides; and e) rejecting the PRC process for protecting non-public information as inadequate and proposing a separate, non-PRC mechanism instead.

The rules establish a process that provides limited transparency (subject to protective conditions) under which the public may play a meaningful role in "accountability, transparency, and oversight of the Postal Service."³⁴ It would entirely subvert PRC's rules and authority to allow the very body which the rules seek to hold accountable to determine and characterize the relevance of any potential information, or conduct its own inquiry into SOC's allegations with no public participation or scrutiny whatsoever. The same rules similarly establish substantial mechanisms, backed by sanctions under Rule § 3011.303, to protect non-public information obtained by public parties through this process. Accordingly, USPS's attempts to avoid the PRC and its

³⁴ Order at 6 (citation omitted).

authority should be rejected, and the PRC should find USPS has waived its right to object to SOC's request for information.

The second reason USPS has waived its right to object to the release of non-public information is because it asserts a wholesale lack of authority to release any such information despite that this is directly contrary to the text of the Contract and the applicable regulatory process.

In the course of conferring, USPS stated multiple times that it might be unable to release any information whatsoever without the consent of Amazon. Thus on the issue of identifying which NSA between USPS and Amazon is potentially relevant to our request, the Postal Service not only refused to confirm that any contract between itself and Amazon exists or otherwise assist in identifying any potentially relevant contract, it also stated that it might be barred from confirming any contract even exists without the consent of any party to any such contract.

Similarly, although USPS inquired what narrower categories of information SOC would be willing to accept, it reiterated that it is likely bound by the terms of the contracts themselves to obtain consent from any party to those contracts to release any information. Likewise, although USPS asked SOC if it would accept a statement containing USPS's own determination whether the relevant contract contains information that bears on SOC's inquiry, it stated that it likely would not be able to release such a statement without obtaining permission of the private party to the contract. Even in refusing to rely on the PRC's rules to protect non-public information and proposing a separate order for this purpose, it stated it may also be bound by its

contractual obligations to obtain permission from the party to the contract to enter into a confidentiality agreement with SOC.

USPS is therefore asserting a blanket lack of authority to release, in any form, the information SOC seeks. In effect, USPS claimed it does not have meaningful authority to make any compromise with SOC on the matters identified by the Commission. Rather it signaled this authority resides in the counterparty to the contract at issue, Amazon. It follows that USPS counsel engaged in only the illusion of bargaining, inviting SOC to narrow its position, without expressing any capacity or willingness to do the same. This additional barrier to obtaining information renders USPS's participation in the meet and confer process meaningless and illusory.

This is contrary to the language of the Contract. The Confidentiality Clause of the Contract, which is unredacted, authorizes either party to disclose the contents of the contract either with the agreement of the counterparty *or*, when "required by applicable law."³⁵ In the latter case it requires that "the disclosing Party must notify the non-disclosing Party, and the Parties will make reasonable efforts to cause a mutually agreeable disclosure to be issued."³⁶ Because applicable law contemplates the Postal Service negotiating and reaching agreement with members of the public who request access to non-public information, its blanket refusal to consider any release of information contravenes the Contract and thus the law itself.

More to the point, the assertion that USPS lacks the power to release non-public information is absurd on its face, because USPS is therefore claiming it does not have the power to comply with the process established for its own oversight. If USPS or

³⁵ Contract at 20, Section 1.X.

³⁶ *Id.* at 20-21.

other actors could insulate themselves from public oversight – or other regulatory compliance – by simply contracting with a third party to prevent such compliance, legal and public accountability and authority would be entirely meaningless. In short, USPS should not be permitted to immunize itself from complying with Commission Rules §§ 3011.300 to 305 on procedures for seeking access to non-public materials by claiming that only a private party to the NSA may authorize the release of information. To hold otherwise would elevate private agreements over public law created specifically to hold those parties accountable, and in effect relinquish the power to make these decisions to a private corporation – in this case Amazon. SOC has very little doubt of the outcome if Amazon is permitted to decide whether the public may obtain information in order to hold Amazon accountable to public rules and laws.

Because USPS takes a position that is nonsensical and seems intent on rejecting and circumventing PRC's authority to regulate the release of non-public information in order to, as the Commission put it in Order 6189, "provid[e] accountability, transparency, and oversight of the Postal Service,"³⁷ the PRC should hold that USPS has waived any right to object to release of the information that SOC seeks.

c. Because the Postal Service asserts that the Contract bars it from compromising with SOC, the public interest in transparency and accountability may be secured *only* through a Commission Order.

In its meetings with SOC pursuant to Order 6189, the Postal Service claimed that the terms of the Contract barred it from making meaningful offers of compromise with SOC without the consent of Amazon. The Postal Service's position appears to be based on the Confidentiality Clause of the Contract, which is unredacted.³⁸ However,

³⁷ Order at 11.

³⁸ Contract at 20, Section 1.X.

the clause authorizes either party to disclose the contents of the contract either with the agreement of the counterparty **or**, when “required by applicable law.” In the latter case it requires that “the disclosing Party must notify the non-disclosing Party, and the Parties will make reasonable efforts to cause a mutually agreeable disclosure to be issued.”³⁹ In the present context the “applicable law” is an Order granting access issued by the Commission pursuant to Rule § 3011.300 (c). Because the Postal Service has argued that this language bars it from compromising with SOC regarding disclosure, it has effectively transferred full responsibility to the Commission to determine access based on the Commission’s interpretation of the applicable law. Accordingly, only the Commission can make the determination that SOC may obtain access to the non-public information it has requested, because the Postal Service has effectively abdicated this responsibility in favor of the power of the Commission.

SOC’s Affiliation

SOC is a non-profit research and advocacy organization supported by a coalition of labor unions. Its individual counsel are solely employed by SOC. Neither SOC as an organization nor its individual counsel have any affiliation with the delivery services, communications, or mailing industries, and neither SOC nor its individual counsel are in any way involved in “competitive decision-making” within those industries.

³⁹ *Id.* at 20-21.

Conclusion

For the foregoing reasons, SOC respectfully requests immediately release of the full, unredacted version of the Contract and supporting Governor's decision.

Respectfully submitted,

DATED: August 17, 2022

THE STRATEGIC ORGANIZING CENTER

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/s/ George W Faraday
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EXHIBIT 1

Protective Conditions Statement

The Postal Service requested confidential treatment of non-public materials identified as Governor's Decision 19-1 and Parcel Select Contract 44. SOC ("the movant") requests access to these materials that have been filed in Docket Nos. CP2021-43 and MC2021-42.

The movant has provided to each person seeking access to these materials:

- o this Protective Conditions Statement,
- o the Certification to Comply with Protective Conditions,
- o the Certification of Compliance with Protective Conditions and Termination of Access; and
- o the Commission's rules applicable to access to non-public materials filed in Commission proceedings (subpart C of part 3011 of the U.S. Code of Federal Regulations).

Each person (and any individual working on behalf of that person) seeking access to these materials has executed a Certification to Comply with Protective Conditions by signing in ink or by typing /s/ before his or her name in the signature block.

The movant attaches the Protective Conditions Statement and the executed Certification(s) to Comply with Protective Conditions to the motion for access filed with the Commission.

The movant and each person seeking access to these materials agree to comply with the following protective conditions:

1. In accordance with 39 CFR 3011.303, the Commission may impose sanctions on any person who violates these protective conditions, the persons or entities on whose behalf the person was acting, or both.
2. In accordance with 39 CFR 3011.300(b), no person involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials shall be granted access to these materials.

Involved in competitive decision-making includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with an individual or entity having a proprietary interest in the protected material.

3. In accordance with 39 CFR 3011.302(a), a person granted access to these materials may not disseminate these materials in whole or in part to any person not allowed access pursuant to 39 CFR 3011.300(a) (Commission and court personnel) or

3011.301 (other persons granted access by Commission order) except in compliance with:

- a. Specific Commission order,
 - b. Subpart B of 39 CFR 3011 (procedure for filing these materials in Commission proceedings), or
 - c. 39 CFR 3011.305 (production of these materials in a court or other administrative proceeding).
4. In accordance with 39 CFR 3011.302(b) and (c), all persons granted access to these materials:
- a. must use these materials only related to this matter; and
 - b. must protect these materials from any person not authorized to obtain access under 39 CFR 3011.300 or 3011.301 by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
5. The duties of each person granted access to these materials apply to all:
- a. Disclosures or duplications of these materials in writing, orally, electronically, or otherwise, by any means, format, or medium;
 - b. Excerpts from, parts of, or the entirety of these materials;
 - c. Written materials that quote or contain these materials; and
 - d. Revised, amended, or supplemental versions of these materials.
6. All copies of these materials will be clearly marked as “Confidential” and bear the name of the person granted access.
7. Immediately after access has terminated pursuant to 39 CFR 3011.304(a)(1), each person (and any individual working on behalf of that person) who has obtained a copy of these materials must execute the Certification of Compliance with Protective Conditions and Termination of Access. In compliance with 39 CFR 3011.304(a)(2), the movant will attach the executed Certification(s) of Compliance with Protective Conditions and Termination of Access to the notice of termination of access filed with the Commission.
8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.

DATED: August 17, 2022

Respectfully submitted

STRATEGIC ORGANIZING CENTER

By: /s/ Marka Peterson

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Certification To Comply With Protective Conditions

The United States Postal Service requests confidential treatment of non-public materials identified as Governor's Decision 19-1 and Parcel Select Contract 44 (hereinafter "these materials") filed in Commission Docket Nos. CP2021-43 and MC2021-42.

The Strategic Organizing Center requests that the Commission grant me access to these materials to use to aid initiation of a proceeding before the Commission alleging violations of 39 USC 101(b), 101(e), and 403(c) (hereinafter "this matter").

I certify that:

I have read and understand the Protective Conditions Statement and this Certification to Comply with Protective Conditions;

I am eligible to receive access to these materials because I am not involved in competitive decision-making for any individual or entity that might gain competitive advantage from using these materials; and

I will comply with all protective conditions established by the Commission.

/s/ Marka Peterson

Legal Director and Associate General Counsel

The Strategic Organizing Center

Certification To Comply With Protective Conditions

The United States Postal Service requests confidential treatment of non-public materials identified as Governor's Decision 19-1 and Parcel Select Contract 44 (hereinafter "these materials") filed in Commission Docket Nos. CP2021-43 and MC2021-42.

The Strategic Organizing Center requests that the Commission grant me access to these materials to use to aid initiation of a proceeding before the Commission alleging violations of 39 USC 101(b), 101(e), and 403(c) (hereinafter "this matter").

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/s/ George Faraday

Assistant General Counsel

The Strategic Organizing Center